TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY, APPELLANT,

vs.

STATE HIGHWAY COMMISSION OF KANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

FILED SEPTEMBER 25, 1934.

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[fol. 1]

IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

RECITALS AS TO FILING OF PLEADINGS, ETC.

Be it remembered, that on the 15th day of January, A. D. 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for an Alternative Writ of Mandamus, herein, which Motion for Alternative Writ of Mandamus, appears at pages 3, 4, 5 and 6, of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 2] Be it remembered, that on the 15th day of January, 1934, an Alternative Writ of Mandamus was issued a copy of which Alternative Writ of Mandamus appears at pages 7 and 8 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 3] Be it further remembered, that on the 18th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Answer of the Defendant, a copy of which, appears at pages 9, 10, 11, 12, 13 and 14 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 4] Be it further remembered, that on the 24th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for Judgment, which Motion for Judgment appears at page 15 of the Abstract prepared by the Plaintiff, incorporated herein.

[fol. 5] Be it further remembered, that afterward and on the 26th day of January, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Abstract prepared by the plaintiff herein, which Abstract is in the words and figures as follows to-wit:

[fol. 6] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF KANSAS, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

MOTION FOR AN ALTERNATIVE WRIT OF MANDAMUS

Comes now the State Highway Commission of Kansas and for its motion for an alternative writ of mandamus directed to Panhandle Eastern Pipe Line Company alleges and states:

1. That the State Highway Commission of Kansas, plaintiff herein, is a branch of the state government designated as a body corporate and created by chapter 225 of the Laws of 1929, and as such has authority to maintain this action; that plaintiff will be hereafter referred to as the "Highway Commission."

2. That the defendant, Panhandle Eastern Pipe Line Company, is a Delaware corporation, duly and regularly licensed and authorized to do business in the state of Kansas as a foreign corporation; that said defendant will be hereinafter referred to as the "Pipe Line Company."

3. That the Highway Commission has under its supervision and control the state system of highways and has the power and duty to designate, adopt and establish, to lay out, open, relocate, alter, vacate, redesignate, and reestablish highways in every county in the state as part and parcel of said state system of highways.

4. That the Pipe Line Company is engaged in the business of transporting natural gas by pipe line both in interstate and intrastate commerce; that for such purpose it owns, operates and maintains a system of pipe lines, tele-
[fol. 7] phone and telegraph lines; that several hundred miles of such lines are located within the boundaries of the state of Kansas and are located upon and over privately owned easements and on and across public roads and highways, upon and across navigable and nonnavigable streams and both private and public lands.

5. That the Highway Commission is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the state of Kansas, and for such purposes has secured the necessary rights of way for such improvements. That the proposed changes in said highways are necessary and in the interest of public safety and convenience and have been so determined by the formal action of the Highway Commission. That plans and specifications for such improvements have been adopted and approved by it and contracts let for the construction thereof. That at various points along said highways the rights of way so secured for such purposes cross and intersect privately owned rights of way of the Pipe Line Company which are being used and occupied by it for the purposes of its business. That it is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the Pipe Line Company be changed, lowered, encased or moved all in accordance with the plans and specifications adopted and approved by the Highway Commission for the completion of said highway improvement.

6. That the specific changes now required and necessary to be made in the lines of the Pipe Line Company, as aforesaid, together with the approximate locations thereof, and the general nature of the necessary changes are as follows, to wit:

(A) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective rights of way being in section 20, township 13 south, range 21 east, said point being located on newly acquired highway right of way.

(B) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 I; the point of intersection of the respective rights of way being located in the southeast quarter of section 8, township 19 south, range 17 east, on newly acquired highway right of way.

(C) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16 east, in Coffey county, Kansas,

where the pipe line crosses diagonally the present highway which is being widened forty feet by the acquisition of new right of way.

[fol. 8] (D) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective rights of way being in section 16, township 19 south, range 21 east, Franklin county, Kansas, on new highway right of way.

(E) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widening highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19 south, range 17 east, and sections 13, 14, 15 and 16, in township 19 south, range 16 east.

(F) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8, in Pratt county, Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13 west.

7. That the Pipe Line Company's estimates of the total cost of the various aforesaid changes are as follows, to wit:

A (above)	cost	$406.00
B	cost	1,169.00
C	cost	2,780.00
D	cost	400.00
E	cost	587.00
F	cost	118.00

8. That such relocation, removal or encasing of the lines of the Pipe Line Company, as aforesaid, may be done and accomplished by the Pipe Line Company without the purchase or condemnation of any other or different rights of way than those now occupied by it with its lines in their present location.

9. That the Highway Commission has ordered and directed said Pipe Line Company to make such changes in the location and design of its lines aforesaid, all as con-

templated and provided by R. S. 1931 Supp. 68-415, and has heretofore and on and before December 1, 1933, furnished said company with all necessary plans, specifications and information necessary to enable said Pipe Line Company to proceed to make, accomplish and perform all said changes required by the improvement of said state highways, but that said Pipe Line Company ever since has and now fails, neglects and refuses to conform therewith. That said Pipe Line Company specifically refuses to make such changes in its lines until the Highway Commission has entered into an obligation requiring it to pay the cost of all required material and labor and to indemnify it and pay for all damages inflicted or incurred in the performance of such work.

10. The Highway Commission further alleges that it can-
[fol. 9] not safely or efficiently perfom such necessary changes by any agency within its control, for the reason that the nature of Pipe Line Company's business is such that any such attempt would occasion severe danger and probable irreparable injury and damage to life and property. That it would be impractical for the Highway Commission to attempt to make such changes, and such work can only be accomplished efficiently and with reasonable safety by means acting under the direction and control of Pipe Line Company.

11. The Highway Commission alleges that all the rights of Pipe Line Company in the rights of way involved herein are servient and subject to the needs, demands and requirements of public safety. That the Pipe Line Company's failure and refusal to make the changes in its lines hereinabove specified in accordance with the orders and rulings and plans and specifications of the Highway Commission are without legal right or authority.

The Highway Commission further alleges that it is without any adequate remedy at law.

Now, therefore, the Highway Commission moves and prays this court for an alternative writ of mandamus herein ordering and directing the said Pipe Line Company to forthwith move, change, lower and encase its lines at the points hereinbefore stated in accordance with the orders, plans and specifications adopted and approved by the High-

way Commission or to show cause why the same should not be done. Plaintiff further prays that upon final hearing that the alternative writ be made peremptory.

Wint Smith, Otho W. Lomax.

Duly sworn to by Wint Smith. Jurat omitted in printing.

[fol. 10] IN SUPREME COURT OF KANSAS

ALTERNATIVE WRIT OF MANDAMUS

Whereas, on this 15 day of January, 1934, it appears that the State Highway Commission of Kansas has filed herein its verified motion for an alternative writ of mandamus, copy of which is hereto attached, and it appearing from the allegations and averments thereof that the construction and improvement of certain state highways is being hindered and delayed by the unlawful neglect and refusal of Panhandle Eastern Pipe Line Company to make certain changes in its lines in accordance with the orders, plans and specifications adopted and promulgated by the State Highway Commission of Kansas and which changes are required in the interests of public safety,

Now, therefore, Panhandle Eastern Pipe Line Company is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike manner the changes in its lines hereinafter specified in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission for the improvement of the highways therein referred to, or to show cause, on or before the 25 day of January, 1934, why the same should not be done.

(A) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective rights of ways being in section 20, township 13 south, range 21 east, said point being located on newly acquired highway right of way.

(B) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 I; the point of intersection

of the respective rights of way being located in the southeast quarter of section 8, township 19 south, range 17 east, on newly acquired highway right of way.

(C) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16 east, in Coffey county, Kansas, where the pipe line crosses diagonally the present highway, which is being widened forty feet by the acquisition of new right of way.

(D) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective rights of way being in section 16, township 19 south, range 21 east, Franklin county, Kansas, on new highway right of way.

(E) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widen-
[fol. 11] ing highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19 south, range 17 east, and sections 13, 14, 15 and 16 in township 19 south, range 16 east.

(F) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8, in Pratt county, Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13 west.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas. (Seal.)

Acknowledgment of Service

I hereby acknowledge service upon me this 16th day of January, 1934, of the original alternative writ of mandamus herein.

Panhandle Eastern Pipe Line Company, by G. J. Neuner, General Counsel.

[fol. 12] IN SUPREME COURT OF KANSAS

ANSWER OF DEFENDANT, PANHANDLE EASTERN PIPE LINE COMPANY

Comes now defendant, Panhandle Eastern Pipe Line Company, a corporation, and for its return to the alternative writ of mandamus issued herein on the 15th day of January, 1934, and by way of answer to plaintiff's motion for an alternative writ of mandamus and for cause and reasons for its noncompliance with the provisions of said alternative writ of mandamus, states that said writ should be vacated, set aside, and held for naught, and said plaintiff ought not to be granted its peremptory writ of mandamus herein for the reasons hereinafter state-:

1. Defendant denies all allegations in plaintiff's motion for an alternative writ of mandamus contained, except such as are herein specifically admitted, qualified or explained.

2. Defendant admits the corporate existence and status of plaintiff and defendant as set forth in paragraphs 1 and 2 of said motion.

3. Defendant admits the allegations of paragraph 3 of said motion with respect to the supervision, control, power and duty of plaintiff over highways in the state of Kansas.

4. Defendant admits the allegations of paragraph 4 of said motion with respect to the business of defendant and its ownership and operation of a system of pipe lines, telephone and telegraph lines, and alleges that the portion of defendant's pipe line referred to in said motion is used exclusively in interstate commerce.

5. Answering the allegations of paragraph 5 of said motion, defendant admits that plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the state of Kansas, and for such purposes has procured rights of way for such improvements from the land owners, but states that plaintiff has not procured consent or permission from the defendant to cross the private rights of way and easements owned by defendant and occupied by its pipe line and telephone line nor to make changes in said lines, although plaintiff's rights of way were procured and acquired with full knowledge of

the interests and rights of defendant; admits that plans and specifications for said highways have been adopted and approved by plaintiff and admits the necessity for the construction of such highways as alleged; admits that at [fol. 13] various points along said proposed highways the same will cross and intersect privately owned rights of way of the defendant, which rights of way or easements are being used and occupied by the defendant for the purpose of carrying on its business; admits the necessity of changing, lowering, encasing, or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described.

6. Answering paragraph 6, defendant admits the location and general nature of the changes in defendant's pipe lines and telephone lines, which changes should be made if said new highways are constructed and opened to the public.

7. Answering paragraph number 7, defendant admits that its estimates of the total cost of the various changes are as set forth and alleged by plaintiff, and further alleges that said estimates reflect the fair and reasonable estimated cost of making said changes.

8. Answering paragraph 8 of said motion, defendant admits that the relocation, removal or encasing of defendant's said pipe lines and telephone lines as requested by plaintiff may be done and accomplished without the acquisition of any other or different rights of way by defendant, but alleges that if defendant complies with the orders and demands of plaintiff it will be compelled to incur costs and expenses in the sum of not less than $5,460, the payment of no part of which plaintiff is willing to assume.

9. Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, and alleges that plaintiff has ordered that said changes be made at defendant's own cost and expense and without cost or expense to plaintiff; admits that plaintiff has furnished defendant with plans and specifications and all information necessary to make, accomplish and perform said changes, and admits

that defendant has failed and refused to conform therewith; admits that it has notified plaintiff that it would not make the changes in its said lines as ordered by plaintiff until plaintiff has indicated its willingness and intention to reimburse defendant for the reasonable cost of all required material and labor costs and expenses incurred by the defendant in making the changes in its said lines in conformity with the plans and specifications of said plaintiff. Defendant states that plaintiff's orders requiring defendant to make such changes at such enormous cost and expense to defendant are unreasonable, arbitrary, and void. De-
[fol. 14] fendant denies that the provisions of sec. 68-415, Revised Statutes of the state of Kansas, 1931 Supplement, have any application to changes, relocations, or removals of pipe lines and telephone lines located upon privately owned rights of way not located along, upon, or cross any existing state highway.

Defendant alleges and states that the pipe lines and telephone lines of the defendant at the locations set forth in said motion are all located on privately owned rights of way purchased and acquired by the defendant in the first instance from the owners of the land, and are not located along, upon, or across any existing state highway; that defendant acquired said rights of way in each instance from the owners of the land during the year 1930, and that the agreements for said rights of way were in each instance, during said year 1930, duly recorded in the office of the register of deeds of the county in which said lands are located. That immediately after the acquisition of said rights of way from the land owners, and during said year of 1930 and early in the year 1931, defendant duly entered into the possession of the land covered by said rights of way and constructed its said pipe lines and telephone lines over and through said land, and has at all times since been and is now in the possession thereof and is operating and maintaining its said pipe lines and telephone lines under and by virtue of the right and authority granted to it by the owners of the land under the terms of said agreements for rights of way. That all of said right of way agreements are in substantially the same form and substantially in the form of agreement for right of way executed on the 27th day of August, 1930, by A. A. Norton and A. R. Nor-

ton, his wife, as grantors, to this defendant as grantee, covering and upon lots 1 and 2 in the southeast quarter of section 8, township 19 south, range 17 east, Coffey county, Kansas, a copy of which is hereto attached, marked for identification as Exhibit A and made a part hereof; that the rights of way which plaintiff acquired from the owners of the land were acquired during the year 1933 and long subsequent to the time defendant acquired its rights of way and constructed its pipe lines and telephone lines, and with full knowledge of defendant's interests and rights therein and of the existence and operation of said pipe lines and telephone lines over and through said land. That said pipe lines and telephone lines at the locations described in plaintiff's said motion are permanently installed and constitute improvements of a permanent nature and are operated and used by the defendant in carrying on its [fol. 15] business in the transportation of gas produced in the gas fields of Texas, Oklahoma, and other states, into and through the states of Kansas, Missouri, and other states, and as such are used in carrying on business in interstate commerce. That said telephone lines are privately owned and operated by the defendant for the private use of the defendant, its officers, agents, servants and employees in carrying on defendant's business, and that the same are not operated or used, directly or indirectly, by the public nor for the public use.

Defendant further alleges that if sec. 68-415, R. S. Kansas, 1931 Supp., is given the construction and interpretation placed thereon by plaintiff herein and is construed and interpreted to mean that plaintiff may require the defendant, at defendant's own cost and expense, to remove, relocate, change, and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and at points where the same are not located along, upon, or across any existing state highway, said statute is unconstitutional and void under the provisions of the constitution of the United States, and particularly the fifth amendment, and sec. 1 of the fourteenth amendment to the constitution of the United States, in that such construction will operate to take defendant's private property without due process of law and will deny to defendant the equal protection of the laws; that to require defendant to make such changes at its sole cost and expense will

operate to unreasonably interfere with defendant's business of transporting natural gas in interstate commerce contrary to the commerce clause of the constitution of the United States, sec. 8, art. 1, of said constitution.

10. Answering the allegations of paragraph 10 of said motion, defendant admits that plaintiff is not in position to make the changes or to attempt to make such changes in defendant's pipe lines and telephone lines, and that it would be impractical to attempt to make such changes, and admits that such work can be accomplished efficiently and with reasonable safety only by persons acting under the control of the defendant.

11. Defendant denies that its rights in its rights of way involved herein are servient and subject to the needs, demands, and requirements of the plaintiff to the extent that defendant may be required to expend enormous sums of money in making changes and relocations in its said pipe lines and telephone lines to suit the needs and demands of plaintiff without being duly compensated therefor. Defendant states that its said pipe lines and telephone lines are located upon privately owned rights of way as afore-[fol. 16] said, and are not located along, upon, or across any existing state highways, and that to require defendant to make such changes and relocations at its own cost and expense will constitute a taking of defendant's private property without due process of law contrary to the provisions of the constitution of the United States as aforesaid; that defendant is ready and willing, and has so notified plaintiff, to make the changes, relocations, and removals as required by the plaintiff, in accordance with its plans and specifications, upon proper commitment for reimbursement by the plaintiff for the reasonable cost and expense which defendant will incur in making such changes and relocations as requested and demanded by plaintiff under its said plans and specifications, but that said plaintiff denies that it is obligated or liable to reimburse defendant for such costs and expenses or any part thereof, and insists that defendant make such changes at its own cost and expense

Wherefore, having fully answered, defendant prays that the alternative writ of mandamus issued herein on Jan-

uary 15, 1934, be vacated, set aside, and held for naught, and that plaintiff's prayer for a peremptory writ of mandamus be denied and that defendant may be dismissed with its costs herein expended.

Panhandle Eastern Pipe Line Company, By G. J. Neuner, Its Attorney.

EXHIBIT "A" TO ANSWER

Agreement for Right of Way

Know all men by these presents, that A. A. Norton and A. R. Norton, his wife, of the post office of Wayerly, in the state of Kansas, for and in consideration of one ($1.00) dollar, and other valuable consideration to us in hand paid, receipt of which is hereby acknowledged, we hereby grant and convey unto Panhandle Eastern Pipeline Co. of Kansas City, Missouri, its successors and assigns, a right of way to lay, maintain, alter, repair, operate and remove pipe lines and from time to time parallel pipe lines, drips, gates, telegraph and telephone lines and all appurtenances convenient for the transportation of oil, gas or other substances, together with the right of ingress and egress, over and through the following premises in the county of Coffey in the state of Kansas, to wit:

Lots 1 and 2 in southeast quarter of Section 8, twp. 19 S. range 17E.

[fol. 17] It is further provided and agreed that all surplus rock and earth, shall be removed from right of way after settling, backfilling and completion of line.

It is expressly agreed that width of right of way shall not exceed two and one-half (2½) rods.

It is further agreed that all hauling and transportation of pipe and necessary material shall be confined to specified right of way as near as possible.

It is further provided and agreed that this contract carries the privilege for one line only.

Grantee to maintain, replace or put back all fences and gates during the period of construction; and grantee further agrees to bury pipe line below plow depth during the life time or duration of line.

Should there be any telephone, telegraph or electric lines to follow pipe line, same to follow section lines of the above described property.

Said sum is acknowledged as full consideration for the right of way. All damage to growing crops or other property occasioned by the installation of the first line or by making future repairs or in removing said property, or by laying, repairing or removing other lines, drips and gates, shall be paid by grantee after the damage is done; said damages, if not mutually agreed upon, to be ascertained and determined by three disinterested persons, one to be appointed by the grantor, one by the grantee; and the third by the two so appointed; and the written award of such three persons shall be final and conclusive.

Grantee to place tap in line for domestic use upon the above described land.

It is hereby understood that this agreement cannot be changed in any way except in writing, signed by the grantor, and a duly authorized agent of the grantee.

Signed this 27th day of Aug., 1930.

(Signed) A. A. Norton, A. R. Norton.

Witnesses: (Signed) Elmer Conklin.

STATE OF KANSAS,
County of Coffey, ss:

Be it remembered that on this 27th day of August, 1930, before me the undersigned notary public, personally came A. A. Norton and A. R. Norton, his wife, who is personally known to me to be the same persons who executed the foregoing instrument of writing, and as such persons duly acknowledged the execution of the same.

In witness whereof. I have hereunto set my hand and affixed my official seal at Waverly, Kansas, on the day and year last above written.

(Signed) E. A. Farrow, Notary Public. (Seal.) My commission expires Mar. 11, 1933.

[fols. 18 & 19] IN SUPREME COURT OF KANSAS

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the State Highway Commission, and moves the court for judgment herein on the pleadings for the reasons,

First. That no issue of fact is presented by the pleadings, and,

Second. For the reason that the pleadings show that the plaintiff is entitled to a peremptory writ of mandamus herein.

Wint Smith, Otho W. Lomax, Attorneys for Plaintiff.

To Panhandle Eastern Pipeline Company, defendant, and J. G. Neuner, it's attorney of record.

Notice

You are hereby notified that the foregoing motion will be called up for hearing in the supreme court of the state of Kansas, on Friday, January 26, 1934, at the hour of 9:30 a. m., or as soon thereafter as the same may be heard.

Wint Smith, Otho W. Lomax, Attorneys for Plaintiff.

Service of a copy of the foregoing motion is hereby acknowledged, this — day of January, 1934.

—— —— Attorney for Defendant.

[fols. 20 & 21] IN SUPREME COURT OF KANSAS

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Filed January 26, 1934

This cause comes on for hearing upon the pleadings filed herein, and thereupon after oral argument by Otho Lomax, for the plaintiff and by G. J. Neuner for the defendant said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

[fols. 22 & 23] IN SUPREME COURT OF KANSAS

No. 31804

STATE HIGHWAY COMMISSION, Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

JUDGMENT—March 10, 1934

Thise cause comes on for decision and thereupon it is ordered and adjudged that the judgment herein be entered in favor of the plaintiff and against the defendants for costs. It is further ordered that the clerk of this court issue a peremptory writ of mandamus herein to the defendant commanding it to car-y out the terms of the judgment of this court herein.

It is further ordered that the defendant pay the costs of this cause in this court taxed at $—, and hereof let execution issue.

[fol. 24] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION, Plaintiff

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

Syllabus by the Court

1. Requirements of the state highway commission that a pipe line company make, at its own expense, changes in its pipe line located on the company's right of way procured from landowners, necessitated by subsequent location of a state highway on overlapping right of way procured from the landowners by the state highway commission for highway purposes, considered, and held, the requirements were authorized by chapter 225, Laws 1929.

2. The statute and the requirements do not invade rights secured to the pipe line company by provisions of the Con-

stitution of the United State relating to deprivation of property without due process of law, equal protection of the laws, and interstate commerce.

Original proceedings in mandamus. Peremptory writ of mandamus allowed.

Wint Smith, attorney for the state highway commission, and Otho W. Lomax, of Cherryvale, for the plaintiff.

G. J. Neuner, of Kansas City, Mo., for the defendant.

OPINION—Filed March 10, 1934

The opinion of the court was delivered by BURCH, J.:

The action is one of mandamus, commenced by the state highway commission, to require the pipe line company to adjust its pipe lines and other structures to highway needs.

The parties have collaborated in a most commendable manner in preparation of the motion for the alternative writ and the answer. Issues of fact have been eliminated, [fol. 25] and the highway commission's motion for judgment on the pleadings raises the legal question on which the parties differ. A summary of the pleadings sufficient to indicate the nature of the controversy follows.

The state highway commission is a department of the state government having authority over the state highway system. It possesses power and is charged with duty to establish, construct and maintain, and to alter, vacate, reestablish and reconstruct highways in every county of the state. The pipe line company is a Delaware corporation, engaged in the business of transporting natural gas by pipe line from gas fields of Texas, Oklahoma, and other states, through the states of Kansas and Missouri, and other states. In prosecution of its business, which is both interstate and intrastate, it owns, maintains and operates a system of pipe lines, and in connection therewith telephone and telegraph lines. The pipe line company's lines are all located on its own rights of way, procured from landowners, and none of the lines is located on, along, or across any previously existing highway.

The highway commission is engaged in making certain necessary highway improvements. These improvements consist in widening existing highways and in constructing new highways. In making these improvements the high-

way commission encounters the lines of the pipe line company. The highway commission has acquired rights of way for the highway improvements from landowners, but has not obtained consent of the pipe line company to cross or occupy its rights of way.

The highway improvements necessitate certain changes in the pipe line company's lines. In some instances it is necessary the pipe line be lowered and encased. In other instances it is necessary the pipe line be encased. In other instances it is necessary the pipe line and telephone line be removed to the outer edge of right of way newly acquired by the highway commission for the purpose of widening existing highways. None of the changes will require the pipe line company to acquire any new or additional right of way.

[fol. 26] The highway commission has prepared plans and specifications for the changes described. The highway commission is not so well equipped to make the changes as the pipe line company, and the work of making the changes should be done by the pipe line company's experts. The cost will be in the aggregate not less than $5,460. The highway commission has required the pipe line company to make the changes at its own expense. The pipe line company is willing to make the changes according to the plans, but not at its own expense.

The pipe line company contends that, because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained and the present improvements had been initiated, it is entitled to compensation for all necessary expenditures incurred in making an adjustment of its private use to the later public use of the same rights of way. Certain decisions of this court are cited in support of the contention.

In a series of cases beginning with K. C. Rld. Co. v. Comm'rs of Jackson Co., 45 Kan. 716, 26 Pac. 394, and ending with a per curiam decision in S. K. Rly. Co. v. Comm'rs of Johnson Co., 52 Kan. 138, 34 Pac. 396, it was held that when a highway was constructed across an existing right of way, the railroad company was entitled to damages. These cases were decided by a divided court and, as the court subsequently observed in the opinion in the case of The State, ex rel., v. Railway Co., 95 Kan. 22, 27, 147 Pac. 801, were against the great weight of authority.

The decisions simply gave literal effect to the eminent domain statute providing for damages, and are no longer controlling because of enactment of the present highway law regulating highway crossings of railroads under the state's police power.

The pipe line company refers to the case of City of Wichita v. Wichita Union Terminal Rly. Co., 127 Kan. 855, 275 Pac. 171. In that case a city street which did not cross a railroad right of way was vacated. Afterwards the street was reopened. Then the city undertook to compel the railroad company to construct a subway under its tracks, at its own expense. So far as the evidence disclosed, there was not then and never had been a street which [fol. 27] crossed the railroad right of way at the location of the proposed subway, and the subway would not be on any street.

The pipe line company refers to the case of Cities Service Gas Co. v. Riverside Drainage Dist., 137 Kan. 410, 20 Pac. (2d) 520. In that case a small stream crossed a 12-acre tract of land owned by the gas company, on which was located its compressor station. The gas company owned the bed and banks of the stream. Beneath the bed of the stream the gas company maintained a large pipe line for transportation of natural gas. The tract was within a drainage district which had power to widen and deepen the stream. Desiring to enlarge the water course, the drainage district instituted condemnation proceedings under a statute providing for appraisal of land taken, and assessment of other damages sustained by landowners, to be paid by the drainage district. The gas company was put to great expense, $2,389.17, in adapting its high pressure pipe line to the situation created by enlargement of the water course, and appealed from the award of damages. The trial in the district court was had on the theory the gas company was entitled to damages, but the court misinstructed the jury with respect to ascertainment of damages. One instruction was based on the theory the gas company did not own the bed of the stream, another instruction was based on the theory the pipe line was an obstruction of a natural water course, and the jury was instructed the gas company could not recover damages consisting of expense of removing and replacing the pipe line to accord with the drainage district improvement.

When the case reached this court, an effort was made to justify the instruction on the theory of exercise of police power. In the opinion it was said private property may not be appropriated without compensation under guise of the police power, and it was further said:

"In an ordinary case of condemnation and appropriation of an owner's property, as in the present case, the constitutional right to compensation cannot be ignored or denied." (P. 414.)

The following excerpts from the opinion recognized phases of exercise of police power over use of streets and highways:

[fol. 28] "There are cases, too, where franchises have been granted to a street-car company, gas company, telephone company, and the like, to place rails, poles and pipes in public streets and other highways, and which they can be required to move without compensation. The primary use of the highways is for public travel, and the companies accept the grants and occupy the highways with their utilities on the implied and reserved power of the city to require their removal when the streets are needed for the higher purpose of public travel and the public safety.

. . . . . .

"Cases cited by plaintiff that the city may require a corporation occupying the streets to lower tracks and a gas and water pipe, by reason of changes of grades of streets, without being entitled to damages from the city, like that of Scranton Gas Co. v. Scranton City, 214 Pa. St. 586, are not applicable here. The city had the superior and reserved power in the streets and could exercise the police power to require changes for the convenience and safety of the public without paying compensation to a corporation holding a grant or easement over the street." (Cities Service Gas Co. v. Riverside Drainage Dist., 137 Kan. 410, 414, 415, 20 Pac. (2d) 520.)

Because the proceeding was an ordinary condemnation proceeding, and not a proceeding under the police power of the state, the judgment of the district court was reversed, and the cause was remanded for a new trial.

The highway commission is given power to condemn land or any interest therein, such as the pipe line company's easements, for highway purposes. The power is to be exercised in accordance with the general eminent domain statute, which provides for assessment and payment of damages. In this instance, however, the requirements of the state highway commission with respect to the pipe line changes were not made in or in connection with any eminent domain proceeding, and condemnation cases may be left at one side.

Paragraph 5 of the motion for the writ contains the following:

[fol. 29] "It is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the pipe line company be changed, lowered, encased or moved, all in accordance with the plans and specifications adopted and approved by the highway commission for the completion of said highway improvement."

The answer of the pipe line company contains the following:

"Answering the allegations of paragraph 5 of said motion, defendant * * * admits the necessity for the construction of such highways as alleged; admits that at various points along said proposed highways the same will cross and intersect privately owned rights of way of the defendant, which rights of way or easements are being used and occupied by the defendant for the purpose of carrying on its business; admits the necessity of changing, lowering, encasing, or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described."

What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe. Reasonable regulations to that end may be enforced without compensation to co-users of the highway whose structures make public travel unsafe; and because the public use is paramount and public safety is the desideratum, it makes no difference whether the highway

was established before or after the privately owned structures were established.

The principles just stated have been approved and applied in decisions of the Supreme Court of the United States. The case of Denver & R. G. R. R. Co. v. Denver, 250 U. S. 241, involved removal of a railroad track from a street corssing. The opinion contains the following reference to previous cases:

[fol. 30] "The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583; Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis, 232 U. S. 430; Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe. New York & New England R. R. Co. v. Bristol, 151 U. S. 556; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there. Baltimore v. Baltimore Trust Co., 166 U. S. 673; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another location at its own cost to make room for a public drainage system, New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453." (P. 244.)

In the New Orleans Gas & Light Co. case, just cited, the headnotes summarize the decision as follows:

"The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.

"Every reason of public policy requires that grants in the sub-surface of streets shall be held subject to such reasonable regulation as the public health and safety may require.

[fol. 31] "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking of property without due compensation.

"Under the facts of this case, the changing of the location of gas pipes at the expense of the gas company to accommodate a system of drainage, which has been upheld by the state court as an execution of the police power of the state, does not amount to a deprivation of property without due process of law." (New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453.)

The case of Erie R. R. Co. v. Public Util. Comm'rs, 254 U. S. 394, and cases consolidated with it, involved elimination of railroad grade crossings, removal of water mains, and removal of a telegraph line. The opinion by Justice Holmes refers to previous cases, and contains illuminating discussion of principles.

Since the pipe line company persistently contends it may not be compelled to adapt, at its own expense, its use of the highway to safe public use, because it was on the ground first, it may be well to quote the summary of a portion of the opinion in the Erie case contained in the headnote:

"A state may require a railroad company to do away with grade crossings of public streets, whether laid out before or after the construction of the railroad, and may place upon the company the expense of executing the state's plan to accomplish this by running the streets over or beneath the tracks." (¶ 1.)

[fol. 32] The pipe line company contends it may not be compelled to obey the highway commission's regulations without a statute authorizing the regulations. There is no contention that exercise of the state's police power over the subject may not be committed to the state highway commission, and this was in fact done by chapter 225, Laws 1929. Sections 3 and 8 of the chapter read in part as follows:

"The state highway commission shall designate, adopt and establish and may lay out, open, relocate, alter, vacate, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 8,690 miles. * * * The state highway system thus designated shall be constructed, improved, reconstructed and maintained by the state highway commission from funds hereinafter and otherwise by law provided." (§ 3.)

"The state highway commission is authorized to perform all work, * * * incident to the construction, improvement, reconstruction and maintenance of the state highway system * * * and shall take such steps as will give the provisions of this act full force and effect. * * *" (§ 8.)

These are broad grants of power, and were intended to embrace all details essential to effective establishment, construction and maintenance of the state highway system. The purpose was to have a highway system constructed in such manner that use of it would not be dangerous to the traveling public. Provision was made for an engineering department of the highway commission, and it was contemplated the engineers' plans for construction of any highway would include whatever was necessary to appropriate and safe construction. As indicated, the highway commission was authorized to do the work.

In section 15 of the act specific authority was given to the highway commission to compel steam and electric railroads to construct grade crossings at their own expense. Specific authority was also given to compel such railroads to construct viaducts, tunnels, underpasses and bridges for the safety of the general public. It was provided that for such work the highway commission may pay what in its judgment would be a fair and equitable proportion of the cost, not exceeding 50 per cent.

[fol. 33] Paragraph 16 relates to telegraph, telephone and electric transmission lines, and to pipe lines conveying oil, gas, and water. A copy of the section is appended to this opinion. The statute took effect on April 1, 1929. The pipe line company's rights of way were acquired in 1930, and its lines were constructed in 1930 and 1931. The highway commission acquired its rights of way over the same lands for highway purposes in 1933. The pipe line company contends the statute has no application to highways established after the act took effect which encounter existing pipe lines. The question thus raised is one of statutory interpretation.

Section 16 is readily divisible into three parts, connected by the conjunction "and". Omitting all structures except pipe lines, omitting the conjunction, stating and numbering each part separately and omitting the concluding portion of the third part. the statute reads:

1. Whenever any corporation created * * * for the purpose of constructing and maintaining lines * * * for the purpose of transporting * * * gas * * * by pipe lines * * * shall construct or maintain pipe lines * * * along, upon or across any state highway, such * * * pipe lines shall be located upon that part of the right of way of said state highway designated by the state highway commission.

2. The state highway commission is authorized and empowered to require the removal of * * * pipe lines * * * now upon state highways from the present location on said state highways to such part of the right of way of said state highways at the state highway commission shall designate.

3. If said corporation, upon receiving notice of the requirement of the state highway commission that said * * * pipe lines * * * be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove said * * * pipe lines * * * to such place on the right of way of said state highways as may be designated by the state highway commission, and the cost of such removal shall be paid to said state highway commission by said [fol. 34] * * * corporation upon a statement of cost being furnished to said * * * corporation.

In support of its contention, the pipe line company directs special attention to the second division of the section, and says the language is limited to removal of pipe lines "now on said highways from their present locations." The argument is that removal of an existing line from an existing highway is something entirely different from removal of an existing line when a new highway crosses or occupies the right of way. It is said removal in the former instance may be accomplished by exercise of the police power but removal in the latter instance must be accomplished by condemnation.

The distinction indicated was the basis for the old contention that the new highway could not cross a railroad right of way without payment of compensation, and is unsound. As in the case of railroads, whether the pipe line is established first or the highway is established first, the power to regulate the pipe line is the same. If the pipe line

came first, it is not deprived of right of way or continued use; but the common use of the same right of way for pipe line purposes and highway purposes may be regulated by exercise of the police power for protection of the traveling public. Assuming that the words "now" and "present" appearing in the second subdivision of the section are to be accorded their literal meaning, they were not inserted for the purpose of discriminating between old highways and highways to be constructed in the future.

The act of 1929 discloses it was passed to meet the needs of social and economic conditions which had been revolutionized through perfection of the motor vehicle. As indicated above, the highway commission was charged with establishment of a state wide system of improved highways reaching a possible length of 8,690 miles. This system would carry not only Model T's but the great interstate and intrastate passenger busses and freight trucks. Old highways were to be relocated and reconstructed and new highways were to be located and constructed. There would necessarily be contacts with lines of railroads, with telegraph, telephone, and electric transmission lines, and with pipe lines for transportation of oil, gas, and water. [fol. 35] There would be contacts of both old and new highways with old and new lines. The general grant of power to deal effectively with an enterprise of this magnitude in the interest of the public convenience and safety, has been discussed, and the statute is not to be interpreted in any narrow, technical or illiberal manner. Established occupation of existing highways by pipe lines was given no immunity from regulation. The greatest menace to safety was the grade railroad crossing. In providing for regulation of such crossings, no distinction was made between existing highways and future highways across existing tracks. The pipe line company ventures no argument grounded on purpose of the act or nature of the subject for an exception to regulation of its pipe line, and the need of regulation is precisely the same whether the pipe line or the highway first arrives at a given locality.

The first subdivision of section 16 of the statute provides in effect that whenever a pipe line is constructed along, upon, or across any highway, its location is subject to control by the highway commission. Regulation of original construction of a pipe line is thus provided for. But the

section also provides that whenever a company shall maintain a pipe line upon, along, or across any highway location is subject to regulation.

The motion for the writ alleges and the answer admits the following:

1. The highway commission is engaged in improving, widening, relocating, constructing and reconstructing certain highways.

2. The highway commission has procured rights of way for the improvements.

3. Plans and specifications for the improvements have been prepared and adopted. The motion states that contracts have been let, but admission of this fact is not specifically made in the answer.

4. The motion states that at various points the highway rights of way which have been secured lie across and intersect the rights of way of the pipe line company. The answer admits that the "proposed highways" lie across and intersect the pipe line company's right of way. The court construes "proposed highways" to embrace highway rights of way which have admittedly been procured.

[fol. 36] 5. The highway commission has prepared and furnished to the pipe line company plans and specifications for the changes necessary at the points where rights of way overlap.

With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, estaboished and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission.

Besides what has been said, the whole act is prospective in its operation. Under a rule for interpretation of statutes in force in this state, words which literally refer to the time a statute takes effect may be read as applicable to the situation existing at the time contemplated action is to be taken. (The State, ex rel., v. City of Lawrence, 101 Kan. 225, 165 Pac. 826.) If, as suggested in the case just cited, the word "already" be substituted for the word "now," in the second subdivision of the section, there

would be no sound basis for a claim that the pipe line company's pipe line is exempt from regulation. Such an exemption would be out of harmony with the whole spirit and purpose of the act, and the court holds the statute should be read to deny the exemption.

The pipe line company contends a grant of power to the highway commission to require removal of structures might be extended to removal of a structure such as a compressor station. The statute grants no such power. The highway commission is not attempting to exercise any such power and, if it were, the court ventures the dictum the highway commission could be enjoined.

The pipe line company's answer asserts the changes required by the highway commission are arbitrary and unreasonable because of the enormous cost of the required changes. There is no contention the cost is excessive in view of the character and amount of work to be done. Necessity for the changes in the interest of public safety [fol. 37] is admitted. In the case of Erie R. R. Co. v. Public Util. Commrs. 254 U. S. 394 referred to above, the railroad company asserted that if any more changes were required the company would soon be bankrupt. In the opinion the court said:

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places in which the public is invited and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down

whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil." (P. 410.)

[fol. 38] The answer duly pleaded violation of rights secured to the pipe line company by provisions of the Constitution of the United States relating to taking private property without due process of law, equal protection of the laws, and interstate commerce. Whatever burden on interstate commerce adjustment of the pipe line company's use of the highways to highway uses may occasion, is purely incidental to proper exercise of the state's police power. Transmission lines of all kinds are on the same footing, and are on the same footing with railroads with respect to grade crossings. Separate classification of railroad underpasses and viaducts, permitting exercise of the highway commission's discretion with repect to apportionment of cost, was not unreasonable. The statute does not authorize, and the orders of the highway commission do not involve, a taking of private property without due process of law. Therefore, none of plaintiff's constitutional rights was invaded.

The peremptory writ of mandamus is allowed.

All the justices concurring.

A true copy. Attest:
E. E. Clark, Clerk, Supreme Court. (Seal.)

[fol. 39] Section 16, chapter 225, Laws of 1929 reads as follows:

Removal of poles, piers, abutments, pipe lines or other fixtures along highway; procedure.—Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or for the purpose of constructing and main-

taining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipe lines, or municipal corporations shall construct or maintain poles, piers, abutments, pipe lines or other fixtures along, upon or across any state highway, such poles, wires piers, abutments, pipe lines and other fixtures shall be located upon that part of the right of way of said state highway designated by the state highway commission and the state highway commission is authorized and empowered to require the removal of such poles, piers, abutments, wires and pipe lines and other fixtures now upon state highways from the present location on said state highways to such part of the right of way of said state highway as the state highway commission shall designate, and if said person, firm, or corporation, upon receiving notice of the requirement of the state highway commission that said poles, piers, abutments, wires, pipe lines or other fixtures be moved as herein provided, fails to comply with such requirement of the state highway commission, the state highway commission may remove such poles, piers, abutments, wires, pipe lines and other fixtures to such place on the right of way of said state highway as may be designated by said state highway commission, and the cost of such removal shall be paid to said state highway commission by said person, firm or corporation upon a statement of costs being furnished to said person, firm or corporation. If said person, firm, or corporation refuses to pay said charges, the state highway commission shall notify the attorney general, who shall bring suit against said person, firm or corporation in the name of the state highway commission to recover said amount, such amounts received from such person. firms or corporations shall be placed in the funds from which the cost of such removal was paid.

[fol. 40] Be it further remembered, that on the 29th day of March, 1934, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for a rehearing prepared by the defendant herein; and afterwards and on the 9th day of June, 1934, the same being one of the regular judicial days of the January 1934, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka,

the following proceedings among others was had and remain of record in the words and figures as follows to wit:

[fols. 41 & 42] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 9, 1934

Now comes on for decision the motion for a rehearing of this cause and thereupon it is ordered, that said motion for a rehearing be denied.

[fol. 43] IN SUPREME COURT OF KANSAS

No. 31,804

THE STATE HIGHWAY COMMISSION OF KANSAS, Plaintiff,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, Defendant

OPINION DENYING REHEARING—Filed June 9, 1934

BURCH, J.:

In a petition for rehearing the pipe line company undertakes to limit an admission in its answer in such a way that, as against a motion for judgment on the pleadings, a question of fact would be raised by the general denial contained in the answer.

The motion for the writ alleged the highway commission was engaged in highway construction and improvement, had for the purpose procured rights of way, and the highway changes are necessary for public safety and convenience. The answer admitted "necessity for the construction of such highways, as alleged."

The motion for the writ alleged plans and specifications for the highway improvement had been adopted, and the highways would intersect pipe line rights of way. The motion described the specific pipe line changes "necessary to be made." The motion also contained the following allegation:

"It is necessary and in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the pipe line company be changed, lowered, encased or moved, all in accordance with the plans and specifications adopted and approved by the highway commission for the completion of said highway improvement."

The answer admitted adoption of the plans and specifications, and admitted "such changes should be made if said new highways are constructed and opened to the public." The answer also contained the following:

[fols. 44 & 45] "Admits the necessity of changing, lowering, encasing or moving of defendant's pipe lines and telephone lines, as alleged by plaintiff, if new highways are constructed and opened for the use of the public at the locations mentioned and described."

The answer then proceeded to enumerate reasons why the pipe line company should not be required to make the changes at its own expense. It is now said the last quoted admission went only to necessity, and not to necessity in the interest of public safety. The admission was of necessity "as alleged," and the allegation was of necessity plus interest of public safety. The pleadings are not to be considered as ancient common law pleadings in a criminal case, but according to their fair import. The point now made was not presented in the pipe line company's brief as one bearing on the subject of exercise of the police power of the state by the highway commission, is evidently an afterthought, and is not well taken.

Besides what has been said, when unqualified necessity for the pipe line changes as a feature of highway construction was expressly admitted, basis for exercise of the police power was admitted, and the pipe line company would be in the same situation if its point on the pleadings were well taken.

The petition for rehearing contains nothing of substance which is new, and it is denied.

All the justices concurring.

A true copy. Attest:
E. E. Clark, Clerk, Supreme Court. (Seal.)

[fol. 46] IN SUPREME COURT OF KANSAS

[Title omitted]

PEREMPTORY WRIT OF MANDAMUS—July 6, 1934

Whereas, on January 15, 1934, the plaintiff, State Highway Commission of Kansas, filed its verified motion for an alternative writ of mandamus herein which motion was granted, and alternative writ of mandamus issued to defendant, Panhandle Eastern Pipeline Company, directing it to forthwith proceed to make and complete certain changes in its pipelines and telephone lines specifically described in the alternative writ, and

Whereas, said defendant filed its answer on January 18, 1934 on which day plaintiff filed its motion for judgment on the pleadings, and

Whereas, on January 26, 1934, said cause was fully argued and submitted to the Supreme Court of Kansas for its determination and decision, and

Whereas, on March 10, 1934, the Supreme Court of the [fol. 47] State of Kansas filed its written opinion herein, directing that the alternative writ of mandamus be made peremptory, such written opinion appearing in 139 Kan. page 185 (Advance Sheet #1), and

Whereas, defendant filed its motion for a rehearing on March 29, 1934 and the plaintiff filed its reply on April 7, 1934, and

Whereas, on April 13, 1934, the firm of Burch, Litowich & Royce of Salina, Kansas were given twenty days in which to file briefs amicus curiae in support of defendant's application for a rehearing, and

Whereas, on June 9, 1934, the Supreme Court of the State of Kansas having fully considered and determined the matter and being fully advised in the premises filed its opinion denying said application for a rehearing, such decision being reported in 139 Kan. page 849 (Advance Sheet #4),

It is therefore by the court, considered, ordered, and adjudged, that the Panhandle Eastern Pipeline Company be and it is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike man-

ner the changes in its lines hereinafter specified in accordance with the orders, plans, and specifications, adopted and [fol. 48] approved by the State Highway Commission of Kansas for the improvement of the highways hereinafter referred to:

(a) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 6 in Anderson county, Kansas, being on state highway project No. 6-10-304 E, the point of intersection of the respective right of ways being in section 20, township 13, south, range 21, east, said point being located on newly acquired highway right of way.

(b) Pipe line to be lowered below drainage ditch levels and encased on state highway No. 33 in Coffey county, Kansas, project No. 33-1-352 1; the point of intersection of the respective right of ways being located in the southeast quarter of section 8, township 19, south, range 17, east, on newly acquired highway right of way.

(c) Pipe line to be encased on state highway No. 33, state highway project No. 33-1-352 H, in sections 12 and 13, township 19 south, range 16, east, in Coffey county, Kansas, where the pipe line crosses diagonally the present highway, which is being widened forty feet by the acquisition of new right of way.

(d) Pipe line to be encased and lowered on state highway No. 6, being on project No. 6-11-304 B. The point of intersection of the respective right of ways being in section 16, township 19 south, range 21, east, Franklin county, Kansas, on new highway right of way.

(e) Removal of telephone line to outside edge of new highway right of way acquired for the purpose of widening highway No. 33, project No. 33-9-352 H, in Coffey county, Kansas, said telephone line having formerly been located outside the limits of the original highway in section 7, township 19, south, range 17, east, and sections 13, 14, 15 and 16 in township 19 south, range 16 east.

(f) Relocate telephone line by removing same from present location (outside old highway right of way) to outside edge of new highway right of way acquired for the purpose of widening state highway No. 8 in Pratt county,

Kansas, project No. 8-7-452 E, in sections 33 and 34, township 26 south, range 13, west.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 49] Clerk's Certificate to transcript omitted in printing.

[fol. 50] IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 27, 1934

The said Panhandle Eastern Pipe Line Company assigns the following errors in the record and proceedings in said case.

First. The Supreme Court of the State of Kansas erred in holding and deciding that Sec. 16, Ch. 225, Laws of Kansas 1929 (Sec. 68-415, R. S. Kansas, 1931 Supplement) whereunder the State Highway Commission of Kansas, an administrative agency, ordered and required the defendant, Panhandle Eastern Pipe Line Company, at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon, or across any existing state highway, in order to accommodate said rights of way and easements, pipe lines and telephone lines to the plans and specifications of said Highway Commission for the construction of new highways across the same is, as applied to defendant, valid and constitutional; and in holding and deciding that the said order and requirement of said State Highway Commission made solely under and pursuant to said statute are valid and constitutional, and impose an enforceable and constitutional legal obligation on defendant to obey said requirement; and in ordering defendant by peremptory writ of mandamus to obey and perform said order and requirement; the error being that the construction and interpretation of said statute in said manner makes said statute unconstitutional and void under the provisions of the Constitution of the United States and particularly Sec. 1 of the Fourteenth Amendment to said constitution, in that said

statute when so construed and interpreted and said order of the State Highway Commission made thereunder are uncon- [fol. 51] stitutional, null and void and operate to take said defendant's property without due process of law and deny to it the equal protection of the laws; said statute when so construed and interpreted, by its terms undertakes to delegate to the State Highway Commission, an administrative agency, the arbitrary power to make, and said commission did, pursuant solely to the supposed authority of said statute, make, said order and requirement without previous notice to the defendant and without hearing afforded to the defendant as required by due process of law, without taking or considering evidence, and based solely upon the arbitrary ex parte decision and opinion of said administrative agency; said statute makes no provision for judicial review on the merits of said order and requirement and makes said order and requirement of said administrative agency final and irrevocable and undertakes to create and impose upon said defendant, upon the sole basis of such arbitrary order and requirement of the said State Highway Commission, an enforcible and final legal duty to comply with such order and perform the requirements of said State Highway Commission; thus depriving defendant of due process of law and taking its property without due process of law; that in said suit there was expressly drawn in question the validity of said statute of the State of Kansas when so construed and interpreted on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Kansas is in favor of its validity, which decision is hereby assigned as error.

Second. The Supreme Court of the State of Kansas erred in upholding as valid and constitutional an order of the State Highway Commission of Kansas made solely under and pursuant to the supposed authority of Section 16, Ch. 225, Laws of Kansas 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) under which order the State Highway Commission of Kansas required the defendant herein, at its own cost and expense, to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned rights of way and easements, and not located along, upon or across any existing state highway, in order to accommodate defendant's said rights of way and easements, pipe lines and telephone lines to the

plans and specifications of said State Highway Commission for the construction of new highways, by reason of which the said Supreme Court of the State of Kansas has in effect held that said statute and the order of the State Highway [fol. 52] Commission made pursuant thereto, do not violate Sec. 1 of the Fourteenth Amendment, or Section 8, Art. 1 of the Constitution of the United States, which holding and decision is hereby assigned as error.

Third. In said suit there was expressly drawn in question the validity and constitutionality of a statute of the State of Kansas, namely, Sec. 16, Ch. 225, Laws of 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) on the ground that if the same is construed and interpreted to mean that the State Highway Commission may by its order require the defendant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned property, and not located along, upon or across any existing state highway, in order to accommodate the same to the plans and specifications of the Highway Commission for the construction of new highways across the same, that said statute is repugnant to the due process and equal protection clause of the Constitution of the United States, Sec. 1 of the Fourteenth Amendment, and also repugnant to Sec. 8 of Art. 1 of said Constitution. The decision of the Supreme Court of the State of Kansas was in favor of the validity and constitutionality of said statute when so construed and interpreted, which decision is hereby assigned as error.

For which errors Panhandle Eastern Pipe Line Company prays that the said judgment of the Supreme Court of the State of Kansas, dated March 10, 1934 and made final by order of said Supreme Court of Kansas dated June 9, 1934, in the above entitled cause be reversed and judgment rendered in favor of said Panhandle Eastern Pipe Line Company.

Dated this 27 day of August, 1934.

G. J. Neuner, Chester J. Gerkin, Counsel for Appellant.

[fol. 53] [File endorsement omitted.]

[fol. 54] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 27, 1934

To the Chief Justice of the Supreme Court of the State of Kansas:

Panhandle Eastern Pipe Line Company, your petitioner, respectfully shows:

First. Petitioner is the defendant in the above entitled cause.

Second. The above named plaintiff, The State Highway Commission of Kansas, filed a verified motion in the Supreme Court of the State of Kansas on the 15th day of January, 1934, for an alternative writ of mandamus against the petitioner, Panhandle Eastern Pipe Line Company, alleging and averring that the construction and improvement of certain state highways in the State of Kansas is being hindered and delayed by the unlawful neglect and refusal of said Panhandle Eastern Pipe Line Company to make certain changes in its pipe lines in accordance with the orders, plans and specifications adopted and promulgated by the State Highway Commission of Kansas; that said plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the State of Kansas and that for such purposes it has procured the necessary rights of way for such improvements; that plans and specifications for such improvements have been adopted by said plaintiff and contracts let for the construction of said highways; that at various points along said highways the rights of way so procured for such purposes, cross and intersect privately owned rights of way of the defendant which are being used and occupied by said defendant for the purposes of its business; that it is necessary [fol. 55] in the interest of public safety that at such points of intersection the pipe lines and telephone lines of the said defendant be changed, lowered, encased or moved in accordance with the plans and specifications adopted and approved by the said State Highway Commission for the

completion of said highway improvements; that the State Highway Commission has ordered and directed said defendant to make such changes in the location and design of its lines, all as contemplated and provided by R. S. 68-415, 1931 Supplement, (Sec. 16, Ch. 225, Laws of Kansas 1929), and has heretofore and on or before December 1, 1933, furnished said defendant with all necessary plans, specifications, and information necessary to enable said defendant to proceed to make, accomplish and perform all of said changes required by the improvement of said state highways, but that said defendant ever since has and now fails, neglect sand refuses to conform therewith. It was further alleged that said defendant specifically refuses to make such changes in its lines until the Highway Commission has entered into an obligation requiring it to pay the cost of all required material and labor and to indemnify it and pay for all damages inflicted or incurred in the performance of such work.

On said 15th day of January, 1934, an alternative writ of mandamus was issued by the Supreme Court of Kansas ordering and directing said Panhandle Eastern Pipe Line Company to forthwith proceed to make and complete in an efficient and workmanlike manner the said changes in its lines in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission for the improvement of the highways therein referred to or to show cause on or before January 25, 1934, why the same should not be done. Thereafter and on the 18th day of January, 1934, your petitioner duly filed its answer in said cause. Thereafter and on or about said 25th day of January, 1934, plaintiff duly filed its motion for judgment on the pleadings in said cause. Thereafter and on March 10, 1934, a decision was rendered therein in favor of the said plaintiff, The State Highway Commission of Kansas making said alternative writ of mandamus peremptory.

Third. Thereafter and within the time provided by the statutes of the State of Kansas, your petitioner duly applied for a rehearing, which was denied by the said Supreme Court of the State of Kansas on June 9, 1934. By said order denying a rehearing, the said order of the Supreme Court of the State of Kansas making said alternative writ of mandamus peremptory became final.

[fol. 56] Fourth. In said cause there is drawn in question the validity of a statute of the State of Kansas on the ground of its being repugnant to the constitution of the United States and the decision of the Supreme Court of Kansas, which is the highest Court of Kansas in which a decision could be had, is in favor of its validity in that Sec. 16, Ch. 225, Laws of Kansas 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement), is relied upon by the plaintiff in said case as authorizing it, the said plaintiff, to order and require the said defendant to make and perform the aforesaid changes in the design and construction of the said defendant's pipe lines and telephone lines at its own expense. Defendant contended and asserted in said suit that if said statute is given the construction and interpretation placed thereon by the said plaintiff, and if the same is construed and interpreted to mean that the said plaintiff may order and require the defendant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon privately owned property and at points where the same are not located along, upon or across any existing state highway, said statute as well as the order and requirement of said State Highway Commission, are unconstitutional and void under the provisions of the constitution of the United States, and particularly Sec. 1 of the fourteenth amendment to said constitution in that said statute when so construed and interpreted and the order and requirement of the State Highway Commission of Kansas, made solely under and pursuant to the supposed authority of said unconstitutional statute, are null and void and will operate to take defendant's private property without due process of law and will deny to the defendant the equal protection of the laws; and, further, that such construction and interpretation will operate to unreasonably interfere with the defendant's business of transporting natural gas in interstate commerce, contrary to the commerce clause of the constitution of the United States, Sec. 8, Art. 1 of said constitution. The decision of the Supreme Court of Kansas is in favor of the validity of said statute and of the validity of said order and requirement of said State Highway Commission based thereon.

Wherefore, petitioner prays for the allowance of an appeal from said Supreme Court of the State of Kansas to

[fol. 57] the Supreme Court of the United States in order that the decision of the Supreme Court of the State of Kansas may be examined and reversed; and also prays that a transcript of the record, proceeedings and papers in this case duly authenticated by the Clerk of the Supreme Court of the State of Kansas may be sent to the Supreme Court of the United States as provided by law.

The errors upon which your petitioner claims to be entitled to an appeal are those above indicated and more fully set out in the Assignment of Errors filed herewith.

Dated this 27 day of August, 1934.

G. J. Neuner, Chester J. Gerkin, Attorneys for Petitioner and Proposed Appellant.

[fol. 58] [File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER ALLOWING APPEAL—Filed Aug. 27, 1934

The petition of Panhandle Eastern Pipe Line Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Kansas and the assignment of errors filed therewith and the record of said cause having been considered;

It is ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Kansas as prayed in said petition, and that the Clerk of the Supreme Court of the State of Kansas shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty days from the date hereof.

It is further ordered that said Panhandle Eastern Pipe Line Company shall give good and sufficient security in the sum of $500.00 that said appellant shall prosecute said appeal to effect, and if said appellant fails to make its plea good, it shall answer all costs.

The said appellant now presenting a bond in the sum of $500.00 with National Surety Corporation as surety, it is Ordered that the same be, and is hereby approved.

Dated this 27 day of August, 1934.

W. A. Johnston, Chief Justice of the Supreme Court of Kansas. (Seal Supreme Court, State of Kansas.)

[fol. 60] [File endorsement omitted.]

[fol. 61] Citation in usual form showing service on Otho W. Lomax, filed Aug. 27, 1934, omitted in printing.

[fol. 62] IN SUPREME COURT OF KANSAS

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed Aug. 27, 1934

It is hereby stipulated and agreed by and between G. J. Neuner, Attorney for Panhandle Eastern Pipe Line Company, defendant above named, and Wint Smith and Otho W. Lomax, attorneys for the State Highway Commission of Kansas, plaintiff above named, that the portions of the record which shall constitute the transcript of record on the appeal to the Supreme Court of the United States herein, shall consist of the following:

1. Plaintiff's motion for an Alternative Writ of Mandamus.
2. Alternative Writ of Mandamus.
3. Answer of defendant with exhibit annexed thereto.
4. Motion of plaintiff for judgment on the pleadings.
5. Opinion of the Supreme Court of Kansas.
6. Opinion of the Supreme Court of Kansas denying rehearing.
7. Peremptory writ of Mandamus.
8. Petition for Appeal.
9. Assignment of Errors.

10. Order allowing Appeal.
11. Citation upon plaintiff.
12. This stipulation.
13. Appellant's statement as to jurisdiction.
14. Proof of service upon appellee of copies of petition for Appeal, order allowing Appeal, assignment of Errors and statement as to jurisdiction with acknowledgment of service annexed thereto.

[fol. 63] Said transcript to be prepared as required by law and rules of this state and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court at Washington, D. C., on or before the 6 day of October, 1934.

This stipulation is made and entered into pursuant to Rule 10 of the Supreme Court of the United States.

Dated this 27 day of August, 1934.

G. J. Neuner, Attorney and Solicitor for Appellant, Panhandle Eastern Pipe Line Company; Wint Smith, Otho W. Lomax, Attorneys and Solicitors for Appellee, the State Highway Commission of Kansas.

[fol. 64] [File endorsement omitted.]

[fol. 65] Certificate of transmittal omitted in printing.

[fol. 66] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Sept. 25, 1934

Comes now Panhandle Eastern Pipe Line Company, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

I

The order of the State Highway Commission of Kansas, an administrative agency, requiring appellant at its own cost and expense to remove, relocate, change and alter the location and design of its pipe lines and telephone lines located upon private property, and not located along, upon or across existing state highways, in order to conform the same to the plans and specifications of said Commission for the construction of new highways, which said order was made without prior notice, without a hearing, without evidence, and without an opportunity for appeal and general review, and Sec. 16, Ch. 225 of the Laws of Kansas, 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) construed by the Supreme Court of Kansas herein as giving said Commission the arbitrary power to make such order, and under the authority of which the Commission's order was purported to have been made, operate to take appellant's private property without due process of law and without just compensation and deny to it the equal protection of the laws, in violation of the Fifth Amendment and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and that said order and said statute are therefore unconstitutional and void.

[fol. 67] II

The order of the State Highway Commission of Kansas and Sec. 16, Ch. 225, Laws of Kansas, 1929, (Sec. 68-415, R. S. Kansas, 1931 Supplement) as construed by the Supreme Court of Kansas, and under which said order was purported to have been made, are unconstitutional and void in that said order and said statute when so construed unreasonably interfere with appellant's business of transporting natural gas in interstate commerce, contrary to the commerce clause, Sec. 8, Art. 1, of the Constitution of the United States.

Appellant further states that the record as filed in this Court is deemed necessary to be printed for the consideration of the points set forth above.

Dated this 17th day of September, 1934.

G. J. Neuner, Counsel for Appellant.

Service acknowledged this 21 day of September, 1934.
Wint Smith, Otho W. Lomax, Counsel for Appellee.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 39,040. Kansas, Supreme Court. Term No. 412. Panhandle Eastern Pipe Line Company, Appellant, vs. State Highway Commission of Kansas. Filed September 25, 1934. File No. 412, O. T., 1934.

(5663-C)